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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-85

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., and CITY OF LUVERNE, ET AL., *Petitioners*

v.

PRICE COMMISSION, ET AL., COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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July 1973

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OPINIONS BELOW

The Price Commission rendered no opinion; the announcement of its action is in Appendix A, infra, p. 1a. The District Court did not render an opinion; its order is in Appendix B, infra, p. 2a. The Temporary Emergency Court of Appeals opinion, not yet reported, is in Appendix C, infra, beginning at p. 3a; Judge Hastie's dissent begins at p. 8a.

JURISDICTION

The Temporary Emergency Court of Appeals entered its judgments on June 18, 1973 (Appendix D, infra, pp. 18a-19a). This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabili-

zation Act of 1970, as amended, P.L. 92-210 (85 Stat. 750).

QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals was justified, on grounds of the "great deference" owing to an agency interpretation of its own regulations, in sustaining Price Commission action approving an interim rate increase which plainly failed to comply with mandatory requirements of Price Commission regulations published and put into effect prior to the effective date of the rate increase. Or whether, instead, the majority decision amounts to an abdication of the important function of judicial review which Congress insisted was to be a fundamental safeguard against arbitrary administrative action in cases and controversies arising out of the economic stablization program—particularly when the so-called agency interpretation relied on here has never been articulated by the agency.

REGULATORY AND STATUTORY PROVISIONS INVOLVED

The Price Commission regulations issued January 14, 1972, effective January 17, 1972, provided in Section 300.16(i)(3) as follows (37 F.R. 653):

> (i) *Regulated public utilities—interim report on increases put into effect subject to accounting and refund.*
>
> * * *
>
> (3) Notwithstanding any other provision of this section, no price of the kind covered by this paragraph (i) may be increased before the end of the maximum suspension period permitted by law unless the regulatory agency has certified to the Price Commission that there is good cause for an earlier effective

> date, together with its reasons therefor, and the Price Commission has approved that certification.

Pertinent excerpts from the judicial review provisions of Section 211 of the Economic Stabilization Act of 1970, as amended, P.L. 92-210 (85 Stat. 748-750) are in Appendix E, infra, pp. 19a-23a.

STATEMENT

Judge Hastie's dissent (Appendix C, infra, beginning at p. 8a) sets forth the facts, which may be summarized as follows:

Petitioners, Alabama Cooperatives and Municipalities, purchase power at wholesale from Alabama Power Company. They brought this suit to challenge certain action whereby the Price Commission approved very substantial (about 35%) interim rate increases by Alabama Power despite total non-compliance with Price Commission regulations, mandatory on their face, which became effective before the rate increases were scheduled to go into effect.

On January 14, 1972 the Price Commission published new regulations, effective January 17, 1972, covering interim rate increases by regulated public utilities (37 F.R. 653). The regulations (see p. 2, supra) provided that no such rate may be increased before the end of the maximum suspension period permitted by law "unless the regulatory agency has certified to the Price Commission that there is good cause for an earlier effective date, together with its reasons therefor, and the Price Commission has approved that certification."

At the time these new Price Commission regulations became effective, petitioners were involved as inter-

venors in a pending Federal Power Commission ("FPC") proceeding (FPC Docket No. E-7674) contesting Alabama Power's proposed increases in its wholesale rates to Cooperative and Municipal customers. Alabama Power had filed application for the substantial rate increases with FPC on November 1, 1971, asking that the increases become effective January 3, 1972. On December 30, 1971 the FPC issued an order imposing a suspension period of one month only—instead of the five-month maximum suspension period permitted by law (Section 305(e) of the Federal Power Act, 16 U.S.C. § 824d(e)), which petitioners had sought. Under the December 30 FPC Order, if it became final, the rate increases would have gone into effect on an interim basis on February 2, 1972 if the Price Commission regulations had not intervened. (The FPC order was not yet final, since petitioners had filed timely applications for rehearing with FPC, which were still pending when the Price Commission regulations were published on January 14 and became effective on January 17.) The new Price Commission regulations—which obviously contained no exception for rate increases already scheduled to go into effect at some date in the future—were promptly brought to the attention of FPC on January 21 by petitioners, who cited the regulations as a further ground requiring the suspension to be no less than five months. On January 17, Alabama Power itself had written to the Price Commission that Alabama Power was undertaking to obtain from FPC the certification required by the new Price Commission regulations "in sufficient time for tender to the Price Commission prior to February 3, 1972".

FPC never issued the certification which Alabama Power Company undertook to obtain and which the

Price Commission regulations made mandatory if an interim rate increase were to be permitted to go into effect with less than a five-month suspension. Instead, on February 11, FPC denied petitioners' rehearing applications, adding what Judge Hastie's dissent refers to as "a correct but unilluminating statement" that the FPC order of December 30 was "in conformity with the Regulations in effect at that time".

Petitioners promptly filed with the Price Commission, on February 17, a petition asking the Price Commission to suspend or rescind the February 2 interim rates as price increases plainly prohibited by Section 300.16(i)(3) of the Price Commission regulations. On March 24, 1972 the Price Commission's Office of Public Affairs issued an unsigned "Decision List 74-56" which, in the course of eight pages of tabulations of actions taken, included an announcement that the Price Commission had approved the Alabama Power interim rate increase (see Appendix A, infra, p. 1a). Neither in this announcement, nor elsewhere in the course of whatever decision process it may have utilized, did the Price Commission explain, or even state expressly, why Section 300.16(i)(3) of its regulations does not plainly cover this case so as to make the five-month suspension mandatory; nor did it say who on the staff of the Price Commission, if anyone, thought that the regulations did not plainly cover this case.

Pursuant to Section 211 of the Economic Stabilization Act of 1970, as amended, P.L. 92-210 (Appendix E, infra, pp. 19a-23a), petitioners then, on April 13, 1972, brought suit against the Price Commission and its members, in the United States District Court for the District of Columbia, seeking a declaratory determination that the Price Commission's action in approving the Alabama Power interim rate increases was

invalid as violative of Section 300.16(i)(3) of the Price Commission's own regulations. Alabama Power intervened as a party defendant. Motions for summary judgment were made by both sides, and the District Court (Judge Hart) entered summary judgment for the defendants (Appendix B, infra, p. 2a). On petitioners' consolidated appeals, the Temporary Emergency Court of Appeals on June 18, 1973, affirmed by a vote of 2-to-1. The majority opinion was by Judge Johnson (Appendix C, infra, beginning at p. 3a). Judge Hastie wrote the dissenting opinion (Appendix C, infra, beginning at p. 8a).*

REASONS FOR GRANTING THE WRIT

This case involves important principles concerning the nature and the effectiveness of the judicial review process which Congress insisted shall be a fundamental safeguard in the economic stabilization program.

Respondents presumably will claim that Supreme Court review is not warranted because the case involves

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* While the case was awaiting decision in the Temporary Emergency Court of Appeals, the President, on January 12, 1973, issued Executive Order 11695 (38 F.R. 1473) which terminated Phase II of the Economic Stabilization Program and, among other things, provided for abolishing the Price Commission within not more than 90 days and transferred and assigned various functions to the Cost of Living Council and its Chairman. Pursuant to the Executive Order, the Cost of Living Council terminated the Price Commission effective March 1, 1973 (38 F.R. 6099). Section 3(c) of the Executive Order expressly provided that "This order shall not operate to defeat any suit, action, prosecution, or administrative proceeding, whether heretofore or hereafter commenced, with respect to any right possessed, liability incurred, or offense committed prior to this date." In view of the foregoing, although the Temporary Emergency Court of Appeals did not change the caption of the case, we have nevertheless, out of an abundance of caution, named the Cost of Living Council and its Chairman as additional parties respondent in this Court. Compare Rule 48, paragraphs 3 and 4; *Stark* v. *Wickard*, 321 U.S. 288, 289 (1944).

a question of interpreting particular Price Commission regulations which are no longer in effect and which, so far as appears, are not an outstanding issue in any other case. But any such contention, while perhaps having some superficial attractiveness, is basically unsound.

It is quite evident that price regulation—together with other aspects of economic stabilization measures to combat inflation—is now one of the major areas of concern of the Federal Government and that this situation can be expected to continue for some time. In this vital area it is of special importance that the lawless administration of the law be discouraged and stamped out, and that conditions be created which would justify public confidence in the fair and impartial administration of the law. Those who regulate prices and wages—who hold in their hands such vast power over the economic life of the Nation—must understand that the courts will not rubber-stamp any action which they take and that certain minimum standards of fairness and competence are fundamental to the lawful discharge of their administrative responsibilities.

As Judge Hastie's dissenting opinion makes so clear, this case manifests a total non-compliance with such standards. Instead, the majority of the Temporary Emergency Court of Appeals has placed its reliance on the "great deference" which it felt the courts should give to an administrative agency's interpretation of the agency's own regulations (see Appendix C, *infra,* p. 7a). The majority has done this despite numerous circumstances which should have compelled the opposite result, including the following:

(i) the Government has admitted that no member of the Price Commission had any participation in the so-called interpretation;

(ii) the subordinate official to whom the Government argued, belatedly, that the power of decision had been delegated did not even claim that he himself had made the decision, but only that the decision had been made by his "office"—the actual person or persons being left wholly unidentified and whether they were professionals or clerks being unspecified; and

(iii) during the consideration and determination of this matter, not a syllable of articulation was ever proffered from the Price Commission as to the reasons why anyone thought such an interpretation of the regulations—which on their face so plainly read the other way—was even tenable.

Such blind judicial acceptance of unarticulated agency action, in the guise of administrative interpretation, is squarely contrary to the principles established by applicable decisions of this Court. E.g., *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 299 U.S. 393 (1937); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168 (1962); *Gulf States Utilities Co.* v. *F.P.C.*, 93 S.Ct. 1870, 1880 (1973). Thus only the other day in *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, No. 72-214, decided June 18, 1973, slip opinion, p. 6, the Court reemphasized it is a "fundamental rule of administrative law" that "the agency must set forth clearly the grounds on which it acted" and "we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process."

Moreover, the decision below reflects a judicial approach which represents a grave departure from the

accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision. The result is all the more bizarre and incongruous because in other circumstances it has been fully recognized that price freezes and price regulations cut across proposed price increases which have not yet gone into effect at the time of the effective date of the price directive. See, e.g., *United States* v. *Cincinnati Transit, Inc.*, 337 F. Supp. 1068 (S.D. Ohio 1972).

The importance of the matter and the need for review by this Court are underscored by the fact that, under the Economic Stabilization Act, the Temporary Emergency Court of Appeals is the sole court of appeals having jurisdiction over judicially-reviewable questions which that Act gives rise to. Direct conflicts of decisions between the circuits will not occur because Congress saw fit to concentrate all such appeals in the single Temporary Emergency Court of Appeals. Section 211 of the Economic Stabilization Act of 1970, as amended (see Appendix E, *infra*, pp. 19a-23a); compare *Lockerty* v. *Phillips*, 319 U.S. 182, 186-189 (1943). Blind deference by that Court to unarticulated administrative interpretations—particularly those so ephemerally-based as this one—is an invitation to disaster.

Intervention by this Court is accordingly called for.

CONCLUSION

The petition for certiorari should be granted. On the merits, as Mr. Justice Black said for the Court in *United States* v. *Moorman*, 338 U.S. 457, 463 (1950), "The language . . . is clear" and "No ambiguities can be injected into it by supportable reasoning." Since for the reasons stated in Judge Hastie's dissenting opinion the decision of the Temporary Emergency

Court of Appeals is so plainly wrong, it is suggested that the case is an appropriate one for summary reversal.*

Respectfully submitted,

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July 1973

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* Various other contentions raised by the respondents were not decided by the Temporary Emergency Court of Appeals. In that Court petitioners' position was that none of those other contentions should be an obstacle to granting summary judgment in favor of petitioners; that remains our position here. However, we assume that, if the judgment is summarily reversed, then this Court may wish to remand the case to the Temporary Emergency Court of Appeals to permit the latter to rule on such contentions in the first instance.

APPENDIX A

Excerpt From Announcement by Price Commission Office of Public Affairs

PRICE COMMISSION

NEWS
Office of Public Affairs
Room 2108
2000 M Street, N.W.
Washington, D. C. 20508
Phone: 202-254-8830

DAILY DECISION REPORT, March 24, 1972

DECISION LIST # 72-56

. . . . . .

A determination has been made that each of the Utilities listed below has had their respective price increase requests approved by their Regulatory Agency, and that these submissions satisfy at least one of the criteria outlined in the revised regulations. The Price Commission is now relinquishing its right to take any further action on these price increase submissions, with the exception of those increases which are considered interim for which the Commission retains the right to act until revised regulations on interim increases are published.

Utility	% Increase To Utility	Type of Rates
Alabama Power Company	1.17	Electric

. . . . . .

APPENDIX B

(Filed Oct. 30, 1972)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 727-72

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, et al., *Plaintiffs,*

v.

PRICE COMMISSION, et al., *Defendants.*
ALABAMA POWER COMPANY, *Defendant-Intervenor.*

Civil Action No. 790-72

CITY OF LUVERNE, et al., *Plaintiffs,*

v.

PRICE COMMISSION, et al., *Defendants.*
ALABAMA POWER COMPANY, *Defendant-Intervenor.*

Order

The above captioned matters having come before this Court on cross motions for summary judgment filed by plaintiffs and by defendants and on a motion to dismiss filed by defendant-intervenor, and

This Court having fully considered the pleadings, motions, memoranda and oral arguments of counsel and having been fully informed in the premises,

IT IS HEREBY ORDERED:

That defendants' motion for summary judgment is hereby granted;

That plaintiffs' motions for summary judgment are hereby denied; and

That defendant-intervenor's motion to dismiss is hereby denied as moot.

/s/ GLH J
United States District Court Judge

Dated:
Oct 30 1972

APPENDIX C

(Filed June 18, 1973)

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. DC-4 and DC-5

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., and CITY OF LUVERNE, ET AL., *Plaintiffs-Appellants*

v.

PRICE COMMISSION, ET AL., and ALABAMA POWER COMPANY, *Defendant-Appellee* and *Intervenor-Appellee.*

* * * * * *

Before TAMM, Chief Judge, HASTIE and JOHNSON, Judges.

JOHNSON, Judge.

Appellants, various cooperatives and municipalities which are wholesale customers of the Alabama Power Company, seek a reversal of an order of the district court which granted appellees' motion for summary judgment. The effect of the lower court's order was to approve an action of the Price Commission allowing certain rate increases by Alabama Power in the sale of electric power to the appellants. We affirm.

On November 1, 1971, the Alabama Power Company filed with the Federal Power Commission (FPC) an application for a rate increase to be effective January 3, 1972, covering sales by the company to the appellants. Rather than reject outright a proposed rate increase, the FPC had authority

to approve the increase but delay its effect during a suspension period lasting as long as five months. 16 U.S.C. § 824d(e). On December 30, 1971, the FPC issued an order permitting Alabama Power's rate increase to go into effect February 2, 1972, after a one-month suspension period ordered to commence January 3. On January 13 and 14, the appellants in this case filed applications for rehearing requesting the FPC to reconsider its order of December 30.

On January 14, 1971, while this application for rehearing was pending, the Price Commission published new regulations dealing with rate increases by public utilities to become effective January 17, 1972. Section 300.16(i)(3) of these new regulations provided:

> (i) *Regulated public utilities—interim report on increases put into effect subject to accounting and refund.*
>
> * * *
>
> (3) Notwithstanding any other provision of this section, no price of the kind covered by this paragraph (i) may be increased before the end of the maximum suspension period permitted by law unless the regulatory agency has certified to the Price Commission that there is good cause for an earlier effective date, together with its reasons therefor, and the Price Commission has approved that certification.

37 F.R. 653 (January 14, 1972).

On January 21, the appellants filed with the FPC a Supplemental Application for Rehearing requesting the FPC to comply with Section 300.16(i)(3) of the Price Commission Regulations by suspending for the full five-month statutory period Alabama Power's proposed increase, which had not yet gone into effect. At the same time, the appellants notified the Price Commission of the status of

the proceeding before the FPC and specifically of their contention that Section 300.16 required the full five-month suspension of the proposed rate increase. On February 11, the FPC issued an order denying rehearing, finding that Section 300.16(i)(3) did not require alteration of its earlier order:

> The order as issued December 30, 1971, is in conformity with the Regulations in effect at that time.[1]

On February 17, 1972, appellants filed with the Price Commission their Request For Rescission Or Suspension Of Interim Rate Increase Permitted To Go Into Effect In Violation Of The Price Commission's Regulations. This submission expressly called attention to the FPC's failure to comply with the provisions of Section 300.16(i)(3). On March 24, 1972, the Price Commission published its Decision List No. 74-56, by which Alabama Power's rate increase was permitted to stand. On March 31, 1972, in a letter to appellants' attorney, Mr. Robert D. Banker, Acting Chief of the Public Utilities and Regulated Industries

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[1] The applicable regulation at that time was Section 300.16(a) which read in pertinent part as follows:

> (a) *In general.* A person which is a regulated public utility . . . may charge a price, rate or tariff in excess of the basic price if that increase has been approved by a regulatory agency or other appropriate legal authority. A public utility which had revenues of $100 million or more during its most recent fiscal year shall inform the Price Commission of all requests for rate increases and immediately notify the Commission in writing of an agency order granting an increase and of any other authorized increase.
>
> * * *
>
> In order to insure that the goals of the economic stabilization program are attained, the Price Commission reserves the right to review and limit the amount of any such requested increase, ordered increase, or other authorized increase.

36 F.R. 23977 (Dec. 16, 1971).

division of the Price Commission, confirmed that their request for rescission or suspension had been taken into account by the Commission in making its decision of March 24. Subsequently, the appellants filed suit in District Court pursuant to Section 210(a) of the Economic Stabilization Act Amendments of 1971.[2]

Appellants argue that the Price Commission violated its own regulations, Section 300.16(i)(3), in failing to require that Alabama Power's rate increase be suspended for the five-month maximum suspension period permitted by law. It is not argued that the Commission's approval of the increase was inconsistent with other decisions of the Commission or that the regulation itself is contrary to the purposes of provisions of the Economic Stabilization Act. P.L. No. 91-379 (Aug. 15, 1970), as amended by P.L. No. 92-210 (Dec. 22, 1971). It is argued only that, by its language, Section 300.16(i)(3) applies to Alabama Power's rate increase, which was scheduled to take effect after January 17. The Price Commission, however, did not interpret the regulation as applying to Alabama Power's rate increase, since the proposed increase was reviewed and decided upon by the FPC prior to the effective date of the new Price Commission regulations, even though the actual rate increase did not take place until after the regulation was in force.[3]

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[2] P.L.N. 92-210 (Dec. 22, 1971).

§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief . . . .

[3] The contention that the decision allowing the rate increase was not an "interpretation" of the regulation because it was made by staff members and not by the Commission is not well-taken. It appears from the record that the authority to approve the rate increase, vested in the Price Commission, was properly delegated to staff officials of the Commission. In any case, since the appel-

Appellants' argument needs little discussion. It is true that a governmental agency may not act contrary to its own regulations. E.g. Service v. Dulles, 354 U.S. 363, 372 (1957); Accardi v. Shaughnessy, 347 U.S. 260 (1954). Here, however, Section 300.16(i)(3) is silent on the point in issue between the parties. The section states that no price covered by the section may be increased before the end of the maximum suspension period permitted by law. It does not, however, purport to alter the status of valid suspension orders already issued at the time the regulation became effective. Nor does it purport to exempt rate increases which were approved prior to the effective date of the regulations. In such a case, an administrative agency's interpretation of its own regulation is entitled to great deference by the courts.[4] See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); University of Southern California v. Cost of Living Council, T.E.C.A. No. 9-1 (Sept. 18, 1972); United States v. Lieb, T.E.C.A. No. 5-1 (June 14, 1972). As a further consideration, there is a strong presumption

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lants, without complaining to the Commission, proceeded directly to federal court to challenge an action of the Commission, they will not now be heard to argue that, in fact, there was no "action" taken by the Commission.

[4] Appellants urge that this doctrine should not apply here since the Price Commission did not articulate a reason for its interpretation of the regulation. It is true that the Commission merely issued a list of approved rate increases. In the context in which the rate increase was approved, however, it was quite clear that the Commission accepted the FPC's position that its actions had been in compliance with the regulations in effect at the time. The Price Commission was fully aware of the application of appellants to the FPC requesting it to comply with Section 300.16 (i)(3) and of the FPC order denying this application and states its position. Indeed, the appellants had made certain that it was brought to the attention of the Commission. Further, the Commission made known to the appellants by letter that it had considered their request for rescission. Under the circumstances the Commission, by approving the rate increase, assented to the rationale expressed by the FPC.

against construing regulations so that they have the effect of altering regulatory actions already taken. See Davis, ADMINISTRATIVE LAW TREATISE § 508. Under these circumstances, it clearly cannot be said that the Price Commission acted arbitrarily or capriciously in determining that its regulation 300.16(i)(3) applied prospectively only.

Accordingly, the judgment of the district court is AFFIRMED.

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL.

v.

PRICE COMMISSION, ET AL. & ALABAMA POWER COMPANY.

HASTIE, J.; dissenting.

I am unable to join the majority in giving legal effect to the purported action of the Price Commission that is challenged in this case.

Seeking a substantial increase in the authorized rates that then applied to its sales of power to wholesale customers, including cooperatives and municipalities, Alabama Power Company filed with the Federal Power Commission an application for legally prerequisite agency sanction of this price change. The application was filed November 1, 1971, and it proposed that the higher rates be permitted to become effective January 3, 1972.

As customers who would have to pay the proposed price increases, the municipalities and cooperatives that are plaintiffs in this case filed timely protests with the Federal Power Commission and at the same time requested that agency to suspend the proposed increase for a five-month period pending consideration of and decision on the merits of the proposal, a procedure authorized by Section 205(e) of the Federal Power Act. 16 U.S.C. § 824(d)e. On December 30, 1971, the Commission imposed a suspension

period of one month only, thus permitting the proposed increase to become effective on an interim basis on February 2, 1972. Two members dissented on the ground that a five-month suspension, the maximum authorized by law, should have been imposed as the present appellants had requested.

On January 14, 1972, the Price Commission, exercising its unquestioned power under the Economic Stabilization Act, published new regulations applicable to rate increases by all such public utilities as Alabama Power Company. Subsection 300.16(i)(3) of the new regulations, 37 Fed. Reg. 653 (1972), provided that no interim price increase should be put into effect "before the end of the maximum suspension period permitted by law [in this case five months] unless the regulatory agency [here the Federal Power Commission] has certified to the Price Commission that there is good cause for an earlier effective date, together with its reasons therefor, and the Price Commission has approved that certification".

Recognizing the applicability of this regulation to its imminent interim price increase, Alabama Power Company wrote to the Price Commission on January 18, 1972, that it was undertaking to obtain the required certification by the Federal Power Commission and that "it was expected that such certification will be obtained in sufficient time for tender to the Price Commission prior to February 3, 1972".

On January 21, 1972, the appellants asked the Federal Power Commission to amend its interim rate order to conform to the new Price Commission requirement of a five-month suspension. The Federal Power Commission neither granted this relief nor certified to the Pay Commission that a suspension period of less than five months was warranted in this case. Instead, it entered an order on February 11, 1972, refusing to reconsider its December order and justifying this disposition of the matter by a correct but

unilluminating statement that the order of December 30, 1971, "is in conformity with the Regulations in effect at that time".

In the meantime, when the one-month suspension period ended on February 2, Alabama Power Company had put its rate increases into effect.

Challenging this action, the appellants filed with the Price Commission on February 17, 1972, a petition asking that agency to suspend or rescind the February 2 interim rates as price increases prohibited by Regulation 300.16(i)(3). Apparently in response to this petition and claims asserted in other unrelated cases, there issued from the Price Commission's "Office of Public Affairs" on March 24, 1972, an unsigned document entitled "Decision List #74-56". This eight page tabulation of actions taken on many matters included an announcement that the Commission had approved the Alabama Power Company interim rate increase. The parties to this suit received copies of this document and nothing more.

On April 13, 1972, the appellants filed the present action against the Price Commission and Alabama Power Company in the District Court for the District of Columbia seeking a declaratory determination that the announced administrative approval of Alabama Power Company's February 2, 1972, interim price increases was invalid as violative of Section 300.16(i)(3) of the Commission's own regulations. The opposing parties moved for summary judgment and the court entered summary judgment for the defendants. This appeal has been taken from that judgment.

Certain additional facts about the purported Price Commission action in this case are before us and are relevant to the contentions of the parties. In the district court the plaintiffs submitted and the Price Commission responded to several interrogatories. One interrogatory in-

quired whether "any of the members of the Price Commission . . . participated in" the decision now in question. The Price Commission answered, "No". A second interrogatory read: "Was the Decision recorded in any minute or other record of action, or opinion or other document maintained by the Price Commission apart from Decision List #74-56?" The interrogatory also requested a copy on any such document or record of decision. To this the answer was: "Such matters are irrelevant and privileged as the internal work product of the Commission . . ." The next interrogatory asked the Commission to "identify the individual or individuals" who made the decision. Declining to answer this question, the Commission dismissed it as "irrelevant".

This refusal of an administrative agency to supply a party aggrieved by its announced and purported action with a copy of any formal document embodying that decision or to disclose the identity of the individual or individuals who rendered the decision is amazing and perhaps unprecedented. Accordingly, at the argument of this appeal, we called upon counsel for the Commission to supply the court with the information in question. No document other than the already mentioned "Decision List" was produced in response to our request. We must conclude that there is nothing else in the nature of a decision.

However, the Commission has submitted affidavits showing successive subdelegations of the Commission's authority to dispose of individual petitions concerning price increases: first, from the Commission to its Chairman; second, from the Chairman to the Executive Director; and third, from the Executive Director to the Director of Program Operations. This is related to the present case by an affidavit of Don J. Wortman, Director of the Office of Program Operations, averring that "the price increase application of the Alabama Power Company was approved *by my office* on March 22, 1972". (emphasis added). This

language must mean that Mr. Wortman himself did not personally make the decision. Even now the subordinate staff member who made the decision approving the Alabama Power Company's interim increase remains anonymous. And there is not even a formal record of this subordinate's action, much less any disclosure of its basis, except for the inclusion of the Alabama Power Company case on a decision list published by the Commission's "Office of Public Affairs", presumably after the anonymous staff member instructed that office to list that interim price increase among those to be announced as approved.

It may be helpful to approach the issues that require adjudication by considering what the situation would have been absent any purported Price Commission validation of the February 2 interim price increase.

Alabama Power Company originally proposed that increased rates go into effect January 3, 1972. The Federal Power Commission's order of December 30, 1971, authorized a February 2, 1972, interim effectuation of the proposed increases. But before these interim rates could become effective, the Price Commission's January 14, 1972, publication of Regulation 300.16(i)(3) expressly prohibited any interim increase until the maximum authorized suspension period, here five months, should elapse unless, in an appropriate case, the Federal Power Commission should certify, with an affirmative showing a good cause, that an earlier effective date was warranted and unless the Price Commission should approve that documented certification. Since no Federal Power Commission certification was sent to or acted upon by the Price Commission in this case, Section 300.16(i)(3) would invalidate Alabama Power Company's subsequent interim price increase, unless that regulation was on its face inapplicable to interim increases that had been administratively approved by the Federal Power Commission before its adoption to become effective on a date subsequent thereto. The plain reading of subsection

300.16(i)(3) is that after its January 14, 1972, publication, "no price may be increased" by a seller without compliance with the subsection's requirements. Thus, the regulation operates comprehensively upon all future changes in prices, without regard for the time of their anticipatory sanction by some other regulatory agency whose authority in the premises is subordinate to that of the Price Commission.[1] At the same time, consideration of the judgment of another concerned regulatory agency is not foreclosed, since express provision is made for Price Commission consideration of an appropriate agency's certification that shall present adequate justification for making an interim price increase effective without the otherwise mandated full period of suspension. It will be remembered that Alabama Power Company recognized the applicability of this regulatory scheme to its imminent price increase when it wrote to the Price Commission in January stating its intention to obtain Federal Power Commission certification and submit it for approval before the scheduled date of the increase.

A contention now made by Alabama Power Company that subsection 300.16(i)(3) should not be given "retroactive" application seems to be an afterthought and is beside the point. As has been pointed out, that subsection refers to and restricts only the actual effectuation of price increases. And Alabama Power increased its rates nearly three weeks after the subsection became law. Only a roll back of prices

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[1] It was an agreed premise of our decision in *Bishop* v. *Public Service Co. of N.H.*, T.E.C.A. 1972, 467 F.2d 510, that a "freeze" of public utility rates, imposed by the Price Commission, precluded price increases that already had been authorized by a local regulatory agency to become effective at a time subsequent to the freeze order. Similarly, it was held in *United States* v. *Cincinnati Transit, Inc.*, S.D. Ohio 1972, 337 F.Supp. 1068, that the price freeze of August 15, 1971, barred a public utility price increase that had been authorized by a local regulatory agency before August 15 but was not scheduled to become effective until after that date.

already in effect would constitute a dealing with prices retroactively.

Thus, but for the subsequent purported Price Commission approval of the Alabama Power Company's February 2, 1972, interim price increase as announced in "Decision List # 74-56", that price increase would have been unlawful as a plain violation of the controlling regulation. It remains, therefore, to consider whether the otherwise invalid increase was validated by what was done in the name of the Commission.

The Price Commission was the delegatee of the power to control prices which the Economic Stabilization Act conferred upon the President as a major aspect of authority granted him to stabilize the economy. By successive internal subdelegations the Director of Program Operations was authorized in some circumstances to act for the Commission in approving individual requests for permission to increase prices. One may doubt the desirability of, but recognize impelling practical reasons for this subdelegation of the Commission's adjudicatory authority to a subordinate two steps removed from the Commission itself. But in this case, as has been pointed out, the decision was not made by the staff officer who was the Commission's subdelegatee, but by an unidentified employee in the office of the subdelegatee. I see no way in which such action of a remote subordinate without Commission authorization can lawfully be recognized as effective Commission action validating an otherwise unlawful price increase. And neither the appellees nor my Brothers have suggested how this action can be legitimated.

But this is not the only deficiency here. Even if the Director himself had decided this case, exercising duly delegated authority to approve price increases, he would have been bound and restricted by the relevant regulations of the Commission.[2] Here, the relevant regulation required

a five month suspension of an interim price increase unless the Federal Power Commission should first submit to the Commission a documented certification and the Commission should then approve the proposal thus justified. It might well be appropriate for the Commission's subdelegatee to consider a duly submitted Federal Power Commission certification and justification and to decide for the Commission whether this required submission was adequate and whether the recommended price increase should be approved. But in this case the acceleration of the interim increase was approved without either the certification or the supporting justification that subsection 300.16(i)(3) expressly required. Thus, the person making the decision undertook to disregard or waive a plain requirement of the Commission's regulations.[3] This the subdelegatee himself had not power to do. The action taken in this case went beyond the bounds of the delegated authority and thus, in my view, was legally a nullity whether the subdelegatee himself or someone else in his office was the actor. In my view, the majority opinion incorrectly treats this case as though the Commission itself, not a remote subordinate, had decided to grant an exception to its regulations.

For these reasons, I would reverse the decision of the district court.

I have not overlooked the additional question whether, other considerations aside, mere announcement of sum-

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[2] The government recognizes, as does the majority opinion, that the Commission itself is legally bound to act in accordance with its own regulations. *Cf. Service* v. *Dulles*, 1957, 354 U.S. 363; *Accardi* v. *Shaughnessy*, 1954, 347 U.S. 260.

[3] The Commission has argued, whether rightly or wrongly, that it may make reasonable exceptions in the application of its regulations to particular cases. However that may be, we have here a case in which a staff officer, without Commission approval, has acted contrary to an explicit requirement of a controlling regulation.

mary Commission approval of a contested individual price increase is, for purposes of judicial review, a sufficient performance of the Commission's adjudicatory function. On occasion courts have vacated decisions of administrative agencies because the agency action has lacked explication deemed essential to informed judicial review.[4] Recognizing this need for explication, Congress has mandated that denial of a written petition "of an interested party made in connection with any agency proceeding . . . shall be accompanied by a brief statement of the grounds for denial", unless "the denial is self-explanatory". 5 U.S.C. §§ 555(e). And section 207 of the Economic Stabilization Act Amendments of 1971, 85 *Stat.* 743, 12 U.S.C. 1904 note, explicitly makes this requirement applicable to administrative decisions of wage and price control agencies.

Apparently in an effort to comply with this requirement without imposing upon itself the burden of giving reasons for each original decision, the Price Commission has provided that when an aggrieved party asks it to reconsider a decision and the petitioner "makes a prima facie showing that the Commission's initial action was erroneous in fact or in law", the Commission, "where administratively feasible . . . will issue a decision in writing directed to the appellant setting forth the facts, conclusions of law, its decision, the basis therefor and an appropriate order". See Regulations §§ 305.71, 305.38. But this provision is of no help to an aggrieved party who wants and needs to know the basis of original decision in order to "make a prima

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[4] *E.g. F.P.C.* v. *United Gas Pipe Line Co.*, 1968, 393 U.S. 7; *Burlington Truck Lines, Inc.* v. *United States*, 1962, 371 U.S. 156; *S.E.C.* v. *Chenery Corp.*, 1943, 318 U.S. 80. Recently, the Court of Appeals for the District of Columbia has found it necessary to remand several cases in which summary agency decisions have issued without explanation. *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 1971, 439 F. 2d 584; *Medical Committee for Human Rights* v. *S.E.C.*, 1970, 432 F.2d 659; *Environmental Defense Fund, Inc.* v. *Hardin*, 1970, 428 F.2d 1093.

facie showing" of decisional error such as must appear in his petition for reconsideration. Thus, it is doubtful whether the appellants in this case could have obtained an explanation of the announced agency approval of the challenged interim rate increase by invoking this restrictively qualified procedure for "reconsideration". In any event, they did not try, probably because they were not informed that a subordinate had made the decision. Thus, they brought entirely unexplained administrative action into the judicial forum for review.

Certainly, the agency action as announced in this case does not conform to the requirement of section 555(e) of title 5. But since what was done is invalid for other reasons, I find it unnecessary to decide whether this defect would require a remand to the Commission despite the failure of the appellants to ask for agency reconsideration and explanation of what was decided. Suffice to say, as the matter now stands informed judicial review of agency approval of interim rate increases is seriously impeded, if not precluded, by agency failure to state the basis of that decision.[5]

---

[5] "Sound principles sustain the practice of vesting choice of policy with the . . . [administrative agency]. Its corollary is that the specific decision must be explained, not merely explainable, in terms of the ingredients announced by the . . . [agency] as comprising . . . [its] policies and standards." *Environmental Defense Fund, Inc.* v. *E.P.A.*, D.C. Cir. 1972, 465 F.2d 528, 539.

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-4

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., *Appellants,*

v.

PRICE COMMISSION, ET AL., *Appellees,*

and

ALABAMA POWER COMPANY, *Intervenor*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

In consideration whereof it is ordered that the judgment of said court is Affirmed in accordance with the opinion; Judge Hastie dissenting.

FOR THE COURT:

THOMAS R. NAPTON
Clerk

By /s/ RUTH H. JACOBSON
Ruth H. Jacobson
Deputy Clerk

June 18, 1973

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-5

CITY OF LUVERNE, ET AL., *Appellants*

v.

PRICE COMMISSION, ET AL.,

and

ALABAMA POWER COMPANY, *Appellees.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

In consideration whereof it is ordered that the judgment of said court is Affirmed in accordance with the opinion; Judge Hastie dissenting.

FOR THE COURT:

THOMAS R. NAPTON
Clerk

By /s/ RUTH H. JACOBSON
Ruth H. Jacobson
Deputy Clerk

June 18, 1973

APPENDIX E

Excerpts From Judicial Review Provisions of Economic Stabilization Act of 1970, as Amended (P.L. 92-210, 85 Stat. 748-750)

§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in contro-

versy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The

court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

(e) . . . .

(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except

that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(h) . . . .

FILE COPY

NO. 73-85

SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, *et al.*, and CITY OF LUVERNE, *et al.*,

Petitioners,

v.

PRICE COMMISSION, *et al.*, COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR ALABAMA POWER COMPANY IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-85

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, *et al.*, and CITY OF LUVERNE, *et al.*,

Petitioners,

v.

PRICE COMMISSION, *et al.*, COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR ALABAMA POWER COMPANY IN OPPOSITION

QUESTIONS PRESENTED

(A restatement of the issue presented by petitioner.)

Whether the Price Commission could properly conclude that Section 300.16(i)(3) of its regulations, which required regulatory agencies to suspend proposed rate

increases for the maximum period permitted by law, did not reverse a regulatory decision which had already been taken, where the proposed rate increase had not yet become effective.

(A further issue posed.)

Whether when the Price Commission had delegated authority to its staff to make initial decisions and announce the results in decision lists, but had provided in its regulations that requests for reconsideration could be filed to obtain hearing and written opinion of the Commission, and had further provided that such requests were necessary to exhaust administrative remedies and to obtain judicial review, Petitioners may have recourse to the courts directly from an initial decision and will be heard to complain of its summary character.

REGULATIONS INVOLVED

The Price Commission regulation governing public utilities when the Federal Power Commission issued its order of December 30, 1971, suspending the Alabama Power Company's proposed increase for two months was Section 300.16(a) (36 F.R. 23977):

§300.16 Regulated public utilities.

(a) *In general.* A person which is a regulated public utility (as defined in section 7701(a)(33) of the Internal Revenue Code of 1954 (26 U.S.C. sec. 7701(a)(33)), may charge a price, rate, or tariff in excess of the base price if that increase has been approved by a regulatory agency or other appropriate legal authority. A public utility which had revenues of $100 million or more during its most recent fiscal year shall inform the Price Commission of all requests for rate increases and immediately

notify the Commission in writing of any agency order granting an increase and of any other authorized increase. A public utility which had revenues between $50 and $100 million during its most recent fiscal year shall immediately notify the Commission in writing of any agency order granting an increase and of any other authorized increase. In order to insure that the goals of the economic stabilization program are attained, the Price Commission reserves the right to review and limit the amount of any such requested increase, ordered increase, or other authorized increase.[1]

The superseding regulation, Section 300.16(i)(3) (37 F.R. 653), which became effective after the order of December 30, 1971, but before Alabama Power Company's proposed rate increase had become effective, is reprinted in Petitioners' brief.[2]

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[1] Alabama Power Company fully complied with the informational requirements of this section by its letters of December 1, 1971, informing the Price Commission of its rate filing, and January 11, 1972, informing the Price Commission of the Federal Power Commission's order of December 30, 1971.

[2] Section 300.16(i)(3) was issued on January 14, 1972, and received by Alabama Power Company several days later. The Company immediately, by letter of January 18, 1972, volunteered certain information specified by the section. Upon further analysis the Company concluded that this action was unnecessary and advised the Price Commission by letter of February 1, 1972:

"Since the Price Commission's new rules were not effective until ... subsequent to the Federal Power Commission's order of December 30, 1971, it is our understanding that the old Price Commission rules are applicable to that Federal Power Commission order and the application of new rates commencing February 2, 1972."

The Price Commission regulations which required a request for reconsideration as a prerequisite to judicial review were contained in Section 305.70 *et seq.* (37 F.R. 1245):

Subpart G—Review of Initial Commission Decisions on Matters Other Than Exceptions

§305.70 Purpose and scope.

(a) Requests for obtaining initial decisions by the Commission other than for exceptions are initiated pursuant to Part 300 of this title.

(b) This subpart establishes the rules of the Commission governing reconsideration of denials of such requests, in whole or in part.

§305.71 Scope of review.

The Commission shall reconsider its initial action if the request for reconsideration makes a prima facie showing that the Commission's initial action was erroneous in fact or in law.

(a) Where the Commission determines that the request for reconsideration failed to make a prima facie showing, the Commission may summarily reject the request for reconsideration notifying the applicant of its action and advising him that he has exhausted his administrative remedies and that he may seek judicial review under the Act.

(b) Where the Commission determines that the appellant has made a prima facie showing, it will proceed in accordance with the provisions of §§305.37 through 305.38

§305.72 Who may request reconsideration.

Any person who meets the requirements set forth in §305.71 may request reconsideration by the Commission.

§305.73 Where to file.

A request for reconsideration shall be filed with the Price Commission, 2000 M Street, N.W., Washington, D.C. 20503.

§305.74 When to file.

A request for reconsideration must be filed within 10 days of service of the initial decision by the Commission.

§305.75 Contents of request.

A request for reconsideration shall–

(a) Be in writing and signed by the appellant;

(b) Be designated clearly as a request for reconsideration;

(c) Contain a concise statement of the grounds for reconsideration and the requested relief; and

(d) Be accompanied by briefs, if any.

Section 305.71(b) provided that if the Price Commission concludes that "the appellant has made a *prima facie* showing" of error in a request for reconsideration, the matter would proceed to hearing under Section 305.37 and then to formal decision by the Price Commission under Section 305.38. These sections read as follows (37 F.R. 1010):

§305.37 Hearing.

(a) If the Commission in its discretion deems that a hearing is advisable, it will, within 10 days of the request for reconsideration, direct that a hearing be held before a Hearing Officer, or where the Commission deemed it appropriate, before the Commission in the first instance.

(b) Where a hearing has been directed in accordance with paragraph (a) of this section, it will

be conducted within 10 days after written notice to the appellant at such time and place as the Commission may direct.

(c) Where hearing is conducted in accordance with this section, the appellant may present oral argument and submit such additional documentary evidence as the Hearing Officer deems necessary to fully disclose the position of the appellant.

(d) Within 10 days after the close of the hearing, the Hearing Officer will submit to the Commission a report and any recommendation he deems appropriate with respect to the appellant's request for reconsideration.

§305.38 Decision by Commission.

Where administratively feasible, within 10 days of receipt of a request for reconsideration, or within 10 days of a Hearing Officer's report, where a hearing has been directed–

(a) The Commission will issue a decision in writing directed to the appellant setting forth the facts, conclusions of law, its decision, the basis therefor, and an appropriate order.

(b) A copy of the decision and order will be served upon each party to the proceedings.

(c) Where the decision denies the relief requested, in whole or in part, each party will be advised that he may seek judicial review under the Act.

COUNTERARGUMENT

I.

The issue which Petitioners raised before the Price Commission was whether Section 300.16(i)(3) of its regulations, requiring maximum suspension of rate increases, was intended to reverse a regulatory agency

action that had already been taken, if the rate increase had not yet become effective. The Price Commission answered that the section was not so intended. On appeal the Temporary Emergency Court of Appeals affirmed, relying on three points of law:

1. "[A] governmental agency may not act contrary to its own regulations."[3] (Slip op. at 5.)
2. But when the regulation is silent on the point in issue and the intent is unclear, "an administrative agency's interpretation of its own regulation is entitled to great deference by the courts."[4] (Slip op. at 5.)
3. "As a further consideration, there is a strong presumption against construing regulations so that they have the effect of altering regulatory actions already taken."[5] (Slip op. at 6.)

Each of these points is firmly established in principle and unexceptionable in this particular application.

Not only does the Temporary Court's decision present no out-of-the-ordinary point of interpretation, but it relates to a subject that is now dead-letter. The regulation in question, Section 300.16(i)(3), is no longer in existence. The Price Commission has been terminated. While the Price Commission's functions have reverted to the

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[3] *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

[4] *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972); *United States v. Lieb*, 462 F.2d 1161 (TECA 1972).

[5] Davis, ADMINISTRATIVE LAW TREATISE §5.08 (1958 ed.); *Greene v. United States*, 376 U.S. 149 (1964); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935); *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

Cost of Living Council, that agency has ended the control of public utility rates under the Economic Stabilization Program.[6]

To apply the standards for a writ of certiorari expressed in Rule 19(1) of this Court, the case does not present any "important question of federal law which has not been, but should be, settled by this court" and offers no "special and important reasons" for writ of certiorari.[7]

II.

Petitioners in their brief stress what they consider to have been their summary treatment before the Price Commission: their request for recission or suspension of the proposed rate increase was decided at the staff level and no formal written decision was issued. They fail to

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[6] Section 150.56 of the Cost of Living Council Phase IV Price Regulations provides (38 F.R. 21602):

"Rate increases for commodities or services provided by a public utility are exempt."

[7] Petitioners suggest at page 4 of their brief that the Federal Power Commission's order of December 30, 1971, was not a "final" order, since they had applied for rehearing. The law is directly to the contrary: an application for rehearing of a Federal Power Commission order does not impair its effectiveness or finality. Section 313(c) of the Federal Power Act, 16 U.S.C. §825*l*(c), specifically provides:

"The filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."

And Section 1.34(a) of the Federal Power Commission's Rules of Practice and Procedure, 18 CFR §1.34(a), states that an application for rehearing may be filed "after the issuance of any *final* decision or order by the Commission" (emphasis added).

say that the decision of which they complain was only an initial decision and that the Price Commission regulations spelled out procedures to obtain a formal decision of the Commission by requesting reconsideration. The regulations expressly provided, in fact, that such a request was *prerequisite* to judicial review.

The pertinent regulations were Section 305.70 *et. seq.*, entitled "Review of Initial Commission Decisions on Matters Other Than Exceptions."[8] The regulations contemplated that on a request for reconsideration, the Price Commission would make a preliminary determination of whether or not there was a *prima facie* showing that the initial decision contained error of fact or law. If such showing were made, the matter would be set for hearing culminating in a formal decision of the Price Commission.[9] If such showing were not made, the request for reconsideration would be rejected without hearing[10] but

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[8] These procedural regulations were published January 27, 1972, effective January 21, 1972 (37 F.R. 1245), and applied to the Price Commission's action of March 24, 1972, which is under review here. Later amendment of the procedural regulations made "multiple changes and additions of a perfecting and clarifying nature," but retained the essential requirements regarding exhaustion of remedies (37 F.R. 7623).

[9] Section 305.71(b) provided:

"Where the Commission determines that the appellant has made a *prima facie* showing, it will proceed in accordance with the provisions of §§305.37 through 305.38," providing for "Hearing" and "Decision by Commission."

[10] Section 305.71(a) provided:

"Where the Commission determines that the request for reconsideration failed to make a *prima facie* showing, the Commission may summarily reject the request for reconsideration notifying the applicant of its action and advising him that he has exhausted his administrative remedies and that he may seek judicial review under the Act."

also with formal decision.[11] Under either procedure, the aggrieved party was to be advised when the decision had been rendered that he had exhausted his administrative remedies and could "seek judicial review under the Act."[12] These regulations leave no doubt that the initial decision on Petitioners' request for recission or suspension of the proposed rate increase lacked the incidents of administrative finality essential to judicial review.[13]

Rejecting the prescribed procedures for obtaining a formal decision of the Price Commission, Petitioners took direct recourse from the initial decision to the district court. They now seek to plead the summary character of the initial decision against the Price Commission. But

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[11]Section 305.38 provided:

"Where administratively feasible, within 10 days of receipt of a request for reconsideration, or within 10 days of a Hearing Officer's report, where a hearing has been directed—

(a) The Commission will issue a decision in writing directed to the appellant setting forth the facts, conclusions of law, its decision, the basis therefor, and an appropriate order.

(b) A copy of the decision and order will be served upon each party to the proceedings.

(c) Where the decision denies the relief requested, in whole or in part, each party will be advised that he may seek judicial review under the Act."

[12]See Sections 305.38(c) and 305.71(a).

[13]This court in *Levers v. Anderson,* 326 U.S. 219, 222-223 (1945), recognized that "in a particular administrative pattern new opportunities to challenge afforded by the motion for rehearing may subject an order to such critical administrative review as to reduce it to the level of a 'mere preliminary or procedural' status, thereby divesting it of those qualities of administrative finality essential to invocation of judicial review." The Price Commission's regulations followed just such pattern.

this, of course, cannot be allowed. As the Temporary Court stated, "since the appellants, without complaining to the Commission, proceeded directly to federal court to challenge an action of the Commission, they will not now be heard to argue that, in fact, there was no 'action' taken by the Commission." (Slip op. at 8.) Petitioners' failure to exhaust their administrative remedies constitutes an independent basis for denial of a writ of certiorari.[14]

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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[14]The Temporary Court has emphasized that the exhaustion doctrine applies with full force—indeed with special force—in the economic stabilization area. *City of New York v. New York Telephone Co.*, 468 F.2d 1401 (TECA 1972).

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-85

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., PETITIONERS

v.

PRICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that the Price Commission incorrectly refused to apply its regulation retroactively to invalidate an electric utility rate increase order issued prior to the promulgation of the regulation.

On November 1, 1971, the Alabama Power Company sought authority from the Federal Power Commission to increase rates for the sale of wholesale electric power to rural electric distribution systems. Eleven electric cooperatives (the "Baldwin group") filed an opposition to the proposed increase with the Commission, and subsequently twelve municipalities (the "Luverne group") joined this opposition.

On December 30, 1971, the Commission issued a final order under which the proposed rates became effective, on an interim basis, on February 2, 1972, after a one-

month suspension period.[1] On January 13, 1972, the Baldwin group sought reconsideration of that order. The Luverne group filed a similar petition.

On January 14, 1972, the Price Commission published new regulations controlling rate increases by public utilities, to become effective January 17, 1972 (37 Fed. Reg. 652). The regulations provided, *inter alia*, that (*id.* at 653):

> * * * no price * * * may be increased before the end of the maximum suspension period permitted by law unless the regulatory agency has certified to the Price Commission that there is good cause for earlier effective date, together with its reasons therefor, and the Price Commission has approved that certification.[2]

The "maximum suspension period permitted by law" for the Alabama Power Company application before the Federal Power Commission was five months.

The Baldwin group brought the change in the regulations to the attention of the Federal Power Commission on January 21, 1972, in a supplemental application for rehearing. On February 2, 1972, the proposed rate became effective on an interim basis; on February 11, 1972, the Federal Power Commission denied the petitions for reconsideration, noting that the January 14 Price Commission regulation did not require a further suspension of the proposed rate increase, since the final order of December 30, 1971, conformed with the Price

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[1] The order also set the substantive issues with respect to the proposed permanent rate increase for an evidentiary hearing.

[2] 6 C.F.R. 300.16(i)(3). This regulation was repealed two months later. Public utility rate increases are currently exempt from controls under the Economic Stabilization Program. 38 Fed. Reg. 21602

Commission regulations in effect at that time (Pet. App. 5a).

The Alabama Power Company made prompt reports to the Price Commission, as required by regulation (36 Fed. Reg. 23977), of its application to the Federal Power Commission for a rate increase, and of the Commission orders of December 30, 1971 and February 11, 1972. These matters were also reported to the Price Commission by petitioners.

On March 24, 1972, the Price Commission approved the Alabama Power Company request for the interim rate increase (Pet. App. 1a). Without requesting Commission reconsideration (see 37 Fed. Reg. 1245), petitioners sought immediate review of the Price Commission order in the district court.

The district court granted the respondents' motion for summary judgment (Pet. App. 2a), and the Temporary Emergency Court of Appeals affirmed, Judge Hastie dissenting (Pet. App. 3a). While the case was in the courts, the Price Commission was dissolved, and its functions were assumed by the Cost of Living Council (Executive Order 11695, 38 Fed. Reg. 1477, January 12, 1973).

1. This case involves the application to a unique factual situation of a regulation which is no longer in effect.[3] The decision below has no prospective importance warranting review by this Court.

2. The narrow issue in this case is whether the Price Commission regulation of January 14, 1972, applied to a rate increase authorized by a Federal Power

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[3] Petitioners point to no other case involving the challenged regulation, and we are aware of none.

Commission order which became final before the regulation was issued, when the increase took effect after the effective date of the regulation. The Price Commission held that the regulation did not apply (Pet. App. 5a-6a, and n. 3). This interpretation served two basic regulatory goals: it minimized administrative conflicts in a highly regulated sector of the economy, and enhanced the predictability and certainty of regulatory actions by avoiding retroactivity.

The Price Commission consistently has minimized regulatory conflicts by relying upon the expertise of the federal regulatory agencies in establishing reasonable public utility rates, and by imposing additional restraints only when necessary to enforce substantive Economic Stabilization Program goals.[4] The approval of the Alabama Power Company rate increase reflected this reliance. Having satisfied itself that the Federal Power Commission order of December 30, 1971 fairly and correctly applied the regulation in effect at the relevant time and that its enforcement was not inconsistent with the goals of the Economic Stabilization Program, the Price Commission permitted the interim rate increase.

Petitioners contend that this course of action was inconsistent with the Price Commission's regulation of

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[4] The first Price Commission regulations pertaining to public utility rates permitted increases which had been approved by a regulatory agency (36 Fed. Reg. 21792). This regulation was amended on December 16, 1971, by the addition of the following sentence (36 Fed. Reg. 23977):

> In order to insure that the goals of the economic stabilization program are attained, the Price Commission reserves the right to review and limit the amount of any such requested increase, or other authorized increase.

January 14, 1972. But that regulation did not require the suspension of orders which were issued before its promulgation.[5] Therefore, the Commission correctly refused to apply the regulation retroactively. See *Greene* v. *United States*, 376 U.S. 149, 160; *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U.S. 370, 389-390; Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 411-415 (1941).

3. Finally, petitioners have failed to demonstrate that the Price Commission's interpretation of its own regulation was erroneous. Therefore, the court below correctly adopted that interpretation. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414, this Court stated that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." See also *Udall* v. *Tallman*, 380 U.S. 1, 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[5] The Federal Power Commission's order was final, even though a petition for rehearing was pending when the Price Commission regulation was promulgated. See 16 U.S.C. 825*l*(c); 18 C.F.R. 1.34(a).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-85

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., and CITY OF LUVERNE, ET AL., *Petitioners*

v.

PRICE COMMISSION, ET AL., COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

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PETITIONERS' REPLY

One matter in Alabama Power Company's Brief in Opposition warrants a word of reply.

The Company (Br. Opp., pp. 8-11) contends that petitioners were obliged to file with the Price Commission a request for reconsideration, and that not

having done so, petitioners are foreclosed from obtaining judicial review. This matter, fully briefed in the courts below, was not decided by the Temporary Emergency Court of Appeals but, in our view, the Company's claim on this point is utterly lacking in merit and would be no obstacle to a summary judgment in petitioners' favor.

As our Petition for Certiorari (p. 10, note) indicates, we assume that, if this Court reverses the judgment, then this Court may wish the Temporary Emergency Court of Appeals to rule in the first instance on this contention of the Company. Nevertheless, since the Company's contention turns partly on proper interpretation and application of Price Commission procedural regulations, it seems appropriate to inform the Court that, in the two courts below, the Department of Justice (as the Price Commission's counsel) made clear its position that this particular contention by the Company was without merit and that petitioners were not required to request reconsideration at the Price Commission as a prerequisite to the judicial review sought here (in the District Court, see Government's Memorandum In Support Of Defendants' Cross Motion For Summary Judgment, pp. 16-17; in the Temporary Emergency Court of Appeals, see Supplemental Brief For The Government Appellees, pp. 9-11). Indeed, the Department of Justice took the unequivocal position that, under the Price Commission's regulations, petitioners were not in the class of persons having a right to further administrative review but must come directly to court for relief.

All other matters in the Company's Brief in Opposition and in the Government's Memorandum in Op-

position are sufficiently dealt with in our Petition for Certiorari.

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September 1973